Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1755

JACK ANTHONY GULLO,
Petitioner,

v.

BRUCE E. LAMBERT
and
MIRIAM ANNE HIRST,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the judgment below was sustained on sufficient grounds; that no Federal question has heretofore been raised, and that Petitioner was not deprived of any rights guaranteed by the United States Constitution. This honorable Court should not take jurisdiction and should not grant

a Writ of Certiorari to review the final order of the Circuit Court of Arlington County of the Seventeenth Judicial Circuit of the State of Virginia entered in the above entitled cause on May 9, 1979.

OPINIONS BELOW

The opinion delivered in the Court below is not and will not be officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was rendered on December 13, 1978; the final Order entered on May 9, 1979; a Motion for Rehearing was denied in January, 1979; and the Supreme Court of Virginia denied a Petition for a Writ of Error on February 20, 1980.

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. 1257 (c). Under that statute, there must be a Federal question in order to evoke the jurisdiction of the Supreme Court and the Federal question must have been raised in a proper and timely manner in the State Courts. If the record as a whole shows, either expressly or by clear intendment, that this was not done, the claim is to be regarded as not having been adequately presented and thus, this Court should not review the issue. In this case, the judgment of the Circuit Court of Arlington County was to the effect that under Virginia state law, a malicious prosecution action for wrongful attachment of property will not lie when there is not a valid levy on the property and hence, no attachment. At no time was the issue of the validity of the Virginia statute permitting attachment before judgment adjudicated. Therefore, the constitutionality of such

statute was not raised before the Trial Court and Petitioner herein wrongfully evokes jurisdiction under 28 U.S.C. 1257(c). This honorable Court does not have jurisdiction to hear and determine this matter.

QUESTIONS PRESENTED FOR REVIEW

Petitioner misstates the nature of the legal issue or issues sought to be reviewed and raises for the first time certain constitutional issues. These constitutional issues now being raised are whether the Trial Court's decision granting Respondent's Motion for Summary Judgment and dismissing Petitioner's action for malicious prosecution wrongfully deprived the Petitioner of his property without due process of law as is guaranteed to him by the 14th Amendment to the Constitution of the United States.

Further, Petitioner is asking this honorable Court to review the issue of whether the dismissal of the attachment petition pursuant to the judgment rendered in the main action by Order of the Circuit Court of Fairfax County, entered June 25, 1976 (Pet. for Cert. 4-5.) was a decision as to the veracity and validity of the Writ of Attachment and Levy such as to render the question of veracity and validity *res adjudicata*; and, whether such dismissal thereupon constituted a wrongful taking of Petitioner's property in violation of the due process and just compensation guarantees of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

". . . Nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Constitution of Virginia, Article 1, Section 11

". . . that no person shall be deprived of his life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE

The decision in the Trial Court was rendered with respect to the Petitioner's suit against the Respondent for malicious prosecution based upon a contention that the Respondents had wrongfully attached Petitioner's property and caused him to suffer damages. The attachment the Petitioner referred to had been made pursuant to an action brought by Respondent, Miriam Anne Hirst, in the Circuit Court of Fairfax County, Virginia, against the Petitioner, Jack Anthony Gullo. That suit was decided not in favor of Respondent Hirst, for the reason that a specific amount of dollar damages had not been satisfactorily proven. When judgment was entered in the Fairfax County main action, the Writ of Attachment and Levy were dismissed as a matter of course. Pet. for Cert. 4-5.

In the case sought to be reviewed by this honorable Court, Respondents made a Motion for Summary Judgment at the outset of the trial. The motion was predicated upon the fact that there had not been a valid levy upon Petitioner's real property pursuant to the attachment since the Sheriff's return did not specifically describe the land sought to be attached as was required by the *Code of Virginia,* Section 8-537, 1950 Replacement Volume. Such Motion for Summary Judgment was denied because although the Trial Court found that there was no levy upon land, there still remained a question as to whether there was any property belonging to the Defendant which could have been subject to the levy. TR. 69-72, December 12, 1978.

During the course of the trial, the Petitioner testified that the only property located in the Commonwealth of Virginia that he was possessed of at the time the levy was made, was a certain parcel of real estate. Whereupon the Respondents renewed their original Motion for Summary Judgment, TR. 151-152, December 13, 1978, which Motion was granted.

The Petitioner then filed a Petition for Writ of Error to the Supreme Court of Virginia which Court denied such Writ on February 20, 1980.

REASONS FOR DENYING THE WRIT OF CERTIORARI—ARGUMENTS

I. The Court does not have jurisdiction to entertain the Petition.

Petitioner's action in the Circuit Court of Arlington, Virginia, asked for damages allegedly suffered by reason of an alleged wrongful attachment of property. The Circuit Court granted the Respondents' Motion for Summary Judgment upon the Court's finding that there was not a valid levy on any real property and after Petitioner testified that his only property in Virginia was a certain parcel of real estate.

Throughout the proceedings in the Circuit Court, Petitioner made no claim for damages on constitutional grounds. Further, Petitioner made no attack on the constitutionality of the Virginia statute permitting attachment before judgment or of the constitutionality of the Court's Order. Nor did Petitioner base his Assignments of Error in the Supreme Court of Virginia on constitutional grounds. And in fact the assignments failed to draw in any question of the constitutional validity of any statutes as is required by 28 U.S.C. 1257(c).

Furthermore, the State Supreme Court, by its order refusing the Writ of Error, declared that upon consideration of the record, it was of opinion that the judgment below was plainly right. *Bailey* v. *Anderson,* 326 U.S. 203, 206, 66 S. Ct. 66, 90 L. Ed. 3.

On this record it cannot be said that the Supreme Court of Virginia, by denying the Writ of Error, passed upon any question of the constitutionality of the Virginia attachment statute not raised or passed on by the Trial Court below and unless this affirmatively appears to be the case upon the record brought to this Court for review on Writ of Certiorari, then this Court is without jurisdiction to hear the matter and the Petition for the Writ of Certiorari must be dismissed for want of any properly presented substantial Federal question. *Bailey* v. *Anderson, supra, Jacobi* v. *State of Alabama,* 187 U.S. 133, 135-136, 23 S. Ct. 48, 49, 47 L. Ed. 106.

The purpose of the statutory provision depriving the United States Supreme Court of jurisdiction unless there was drawn in question before the state Supreme Court the validity of a statute of the state on the grounds of its being repugnant to the Constitution or laws of the United States, is to restrict mandatory jurisdiction. *Memphis Natural Gas Company* v. *Beeler,* 315 U.S. 649, 651, 62 S. Ct. 857, 859, 86 L. Ed. 1090.

Further, no judgment of a state court can be reviewed by the United States Supreme Court unless the state Supreme Court has first been apprised that a state statute is being assailed as invalid on Federal grounds. *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185-186, 65 S.Ct. 624.

This jurisdictional requirement is satisfied only if the record shows that the question of the validity under Federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio RR. Co.*, 256 U.S. 125, 126, 41 S.Ct. 402, 403, 65 L.Ed. 856; or has in fact been decided by it. *Nicky* v. *Mississippi*, 292 U.S. 393, 394, 54 S.Ct. 743, 78 L.Ed. 1323.

The record in this case does not disclose that at any time in the course of the proceedings in the Virginia state courts Petitioner asserted the invalidity of a state statute on any Federal ground.

The Motion for Judgment in the Circuit Court of Arlington County, Virginia, alleged only that the Writ of Attachment obtained by Respondents in Fairfax County, Virginia, deprived Petitioner of his property and caused him to suffer damages.

Since the record does not show that the Petitioner presented for decision to the Supreme Court of Virginia any Federal question, and since the Supreme Court of Virginia did not rule on the validity of the Virginia attachment statute, a Writ of Certiorari cannot be obtained from the Supreme Court of the United States. *Wilson et al.* v. *Cook*, 327 U.S. 474, 481, 66 S.Ct. 663, 9 L.Ed. 793.

II. The dismissal of the Writ of Attachment by the Circuit Court of Fairfax County, Virginia, was ancillary to the judgment rendered by that Court in the main cause of action; was not a decision as to the veracity, validity and/or constitutionality of the Attachment Petition itself; and hence the issue of the veracity, validity and/or of the constitutionality of the attachment and levy is not *res adjudicata*.

The rule of *res adjudicata* is applied only in situations where there has been a determination of a given question. Adjudication of a question, essential to former adjudication or *res adjudicata,* is the deliberate action of the Court upon that question, 8B MJ, Former Adjudication or *Res Adjudicata,* § 9; *Hauck* v. *Kerfoot,* 99 Va. 659, 39 S.E. 590. Generally, the adjudication of any question implies the submission of that specific question to a Court of Record. *Pritt* v. *W.V. Norfolk R. Co.,* 132 W.Va. 184, 5 S.E.2nd 105. It is clear from the statement of this case that the ruling in the Circuit Court of Fairfax County went to the issue of damages in a malicious prosecution case. When such damages were not shown with specificity, the Court dismissed the suit and the Writ of Attachment. The issue of the veracity, validity and/or of the constitutionality of the attachment petition itself, and the attendant levy was never specifically addressed by the Court and hence such issue is not *res adjudicata.*

III. An invalid levy on real estate cannot be the basis for an action for malicious prosecution or the basis for an allegation of a wrongful deprivation of property in contravention of the due process clause of the Constitution of the United States of America.

A malicious prosecution action founded on an underlying civil action is recognized only in limited classes of civil actions such as maliciously attempting to throw one into bankruptcy; attachment of his person or property; proceedings to have him adjudged insane or put under guardianship; and the like, which are injurious to property rights of a party by assaults on his credit. Burks, *Pleading and Practice,* § 153 at 263, 4th Ed., 1952. In Virginia, the institution of a civil suit which does not result in arrest of the person,

seizure of property, or other special injury does not furnish the basis for a malicious prosecution action. *National Surety Co.* v. *Page,* 58 F2nd 145, 148 (4th Cir. 1932), reh. den. 54 F2nd 370 (4th Cir. 1932).

Similarly, an action for wrongful attachment cannot lie unless and until the attachment is executed, a levy has been effectuated and a proper return thereof has been made. *Harris* v. *Lipson,* 167 Va. 365, 189 S.E. 349, 351 (1937).

The requirement of a levy is a technical one and must be strictly followed. Unless the officer acts according to the direction of the writ and in accordance with the statutes, the writ constitutes neither an attachment nor a lien thereunder. The process is not of itself an attachment, but only becomes an attachment when it is properly executed. *Harris* v. *Lipson, supra,* 189 S.E., at 351.

The Sheriff's return on the attachment petition in question did not give any description of the real property on which a levy was sought to be made and hence it is clear that no valid levy was ever made on Petitioner's real property. The Writ of Attachment, before a levy thereon, has no more legal effect on the title or interest of the owner of the real estate than a mere summons or subpoena to appear in the proceedings. *Harris* v. *Lipson, supra,* 189 S.E. at 351.

Until a proper levy and a return thereon has been made, the Court has no jurisdiction over the property and the owner is not deprived of any property rights and therefore could not at some later date state that he was deprived of the property without due process and in violation of his rights as guaranteed under the United States Constitution, *Id.*

Since there was no effective levy made on the real property owned by the Petitioner, there clearly was no attachment, and no action predicated upon a wrongful attachment may lie. *Harris* v. *Lipson, supra.*

Furthermore, since the attachment was not effective to seize any property, no action for malicious prosecution based on the underlying civil action can lie. *National Surety Co.* v. *Page, supra.*

PETITIONER'S AND RESPONDENTS' AUTHORITIES DISTINGUISHED

Petitioner states at page 5, Pet. for Cert., that all questions of fact and law respecting the attachment petition were determined by a final Order entered June 5, 1976, and are now *res judicata.* His interpretation of 2A, MJ, Attachment and Garnishment, § 82, and of Burks Pleading and Practice, 4th Ed. Judgments, Res Adjudicata and Estoppel by Judgment, § 357, is erroneous for the reason those while that sections refer to forever putting to rest the key issues, which formed the basis of the attachment petition, they in no way refer to a final adjudication of either the validity or the constitutionality of the attachment petition when those issues were not put before the Court for judicial resolution.

A discussion of the actual meaning of res judicata has been made in the section entitled Argument herein.

Further, in his Statement, Petitioner cites as the basis for bringing his malicious prosecution action in the Circuit Court of Arlington County, Code of Virginia, 8.01-41 and 8.01-568. These sections provide for damage awards to an owner of property which has been wrongfully seized or where the claim of the Plaintiff

has not been established. Neither of these actions were relevant in the Trial Court decision once the Trial Court established that there had never been a valid levy on Petitioner's property. However, regardless of the issue as to the effectiveness of the attachment, it is patently clear that the attachment petition was founded on Respondent Hirst's valid claim for damages in excess of the value of Petitioner's property and because Respondent Hirst knew that Petitioner resided without the State of Virginia and therefore believed he intended to remove all his property to without the State of Virginia. Further, the transcript of the main decision indicates that the Respondent did in fact establish a basis for malicious prosecution. However, a decision was not entered in her favor because a specific amount of dollar damages was not proved.

It is interesting to note that Petitioner relies upon the case of *Persinger* v. *Edwin Associates, Inc.,* 230 S.E.2d 460 (W.Va.) to support his argument that he was deprived of due process since that case clearly states that the West Virginia attachment statute, which is nearly identical to the Virginia statute, provides specialized protections to a Defendant which serve to establish the constitutionality of those procedures in context of the due process requirements. The case also specifically states that if an Affidavit, which contains factual claims is filed and an Order of Attachment is issued by the Clerk, upon a determination that statutory mandates have been met, the same is consistent with due process. Thus, this case supports the action of the Respondents and in no way substantively bolsters Petitioner's Petition for a Writ of Certiorari.

Finally, Petitioner asserts in his Reasons for Granting the Writ that the Trial Court denied Petitioner

a fair trial. To this end, it is to be noted that Petitioner filed an Action, was granted a jury trial, and a decision was rendered by a Court of competent jurisdiction. At no time has there ever been a showing that any member of the bench or bar violated any provision of the Virginia Code of Professional Responsibility or that Petitioner was denied a fair trial. Certainly, if this had been the case, the Supreme Court of Virginia would have granted Petitioner's Writ of Error.

CONCLUSION

Respondents have shown clearly that no Federal question has been raised during the trial of this case such as would give this honorable Court jurisdiction to hear and review this matter. However, even absent this fatal jurisdictional defect, it is convincingly evident that the Trial Court's decision was sustained on sufficient grounds and could not possibly be reversed within any ambit of sound judicial reasoning.

Therefore, we respectfully request that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. Rider, one of the Attorneys for the Respondents herein, and a member of the Supreme Court of the United States, hereby certify that on the 5th day of June, 1980, I served three copies of the foregoing Respondents' Petition in Opposition to Writ of Certiorari in a duly addressed envelope, with postage prepaid, to Joseph S. Gullo, Esquire, Counsel for Petitioner, at his address of record: 5899 First Street, South, Arlington, Virginia 22204.

/s/

JAMES L. RIDER